(1)

Court, U.S.

291335 FEB 2 - 2000

No.

IN THE

Supreme Court of the United States

Security Finance Corp., World Acceptance Corporation, Bell Finance Company of Ardmore, Inc., TLB Sun Loan Company Number 1, Inc., Hennessee, Inc., and Quad States Services, Inc.,
Petitioners,

versus

Earl Clark, Acting Administrator, Oklahoma Department of Consumer Credit, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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February 2, 2000

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57PP

QUESTIONS PRESENTED FOR REVIEW

1. Are the equal protection guarantees of the Fourteenth Amendment violated where Oklahoma Supervised Lenders are required to refund interest earned on loans for which the maximum allowable rate of interest was retroactively changed after 27 years of practice and supervision by the Department of Consumer Credit?

2. May the statutory interest rate for "B" loans stated in the Uniform Consumer Credit Code, as adopted in Oklahoma, be enforced when it is unconstitutionally vague and ambiguous as written?

PARTIES

The parties to the appeal before the Supreme Court of the State of Oklahoma were the Independent Finance Institute, Security Finance Corporation, World Acceptance Corporation, Bell Finance Company of Ardmore, Inc., TLB Sun Loan Company Number 1, Inc., Hennessee, Inc. and Quad States Services, Inc., plaintiffs in the District Court, appellees in the Court of Civil Appeals and the Supreme Court of the State of Oklahoma and Petitioners herein, and Earl Clark, Acting Administrator of the Oklahoma Department of Consumer Credit and the Oklahoma Department of Consumer Credit, defendants in the District Court and appellants in the Supreme Court of the State of Oklahoma.

CORPORATE DISCLOSURE STATEMENT

No publicly held company owns 10% or more of the stock of any of the Petitioners. Petitioner World Acceptance of Oklahoma is a subsidiary of its parent company, World Acceptance Finance Corporation of Texas, a private company.

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IN THE

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Independent Finance Institute, ET AL.,
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versus

Earl Clark, Acting Administrator, Oklahoma Department of Consumer Credit, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

The May 11, 1999 Opinion, as amended on denial of rehearing by the November 4, 1999 Opinion, were released for official publication and appear at *Independent Finance Institute v. Clark*, 990 P.2d 845 (Okla. 1999). Both of those Opinions are set forth in the Appendix hereto.

GROUNDS FOR JURISDICTION IN THIS COURT

This Petition for a Writ of Certiorari seeks review of the Order and Order on Rehearing of the Oklahoma Supreme Court, Case No. 89,504, filed and entered by that Court on May 11, 1999, and November 4, 1999, respectively. Jurisdiction in this Court is conferred under 28 U.S.C. §1257.

STATUTES AND RULES INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oklahoma Constitution, Art. 2, §7. Due process of law.

No person shall be deprived of life, liberty, or property, without due process of law.

Oklahoma Constitution, Art. 2, §15. Bills of attainder - Ex post facto laws - Obligation of contracts - Forfeitures.

No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prohibit the imposition of pecuniary penalties.

Relevant portions of OKLA.STAT. tit. 14A, §§3-205, 3-508A and 3-508B (Supp.1997), of the Uniform Consumer Credit Code, as adopted in Oklahoma, are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioners herein filed a Petition for declaratory judgment and permanent injunction seeking to prevent the acting administrator (the "Administrator") of the Oklahoma Department of Consumer Credit (the "Department") from enforcing an opinion of the Oklahoma Attorney General ("AG Opinion 96-84") which found that certain lenders ("B Lenders") who issued loans under §3-508B ("B Loans") of the Uniform Consumer Credit Code as adopted in Oklahoma ("U3C") may not impose the same finance charges allowed under that section when *refinancing* loans, directly contravening 27 years of industry and Department practice.

The matter was set before the Honorable Judge Bryan D. Dixon, District Court Judge of Oklahoma County (the "District Court"). The District Court issued the permanent injunction against the Administrator and the Department which then appealed the decision and the appeal was heard by the Supreme Court of the State of Oklahoma (hereinafter the "Oklahoma Supreme Court").

The Oklahoma Supreme Court issued its Order on May 11, 1999 (the "May 11, 1999 Order"), reversing the District Court's decision and dissolving the permanent injunction. The Oklahoma Supreme Court found that §3-205 of the U3C limits assessment of B Loan finance charges to those permitted by §3-508A of the U3C (known as the "A Loan" interest rate provisions). Simply put, the Oklahoma Supreme Court held the B Loan rates cannot

exceed those under the A Loan rate structure *when refinancing B Loans*.

Petitioners timely requested a rehearing or clarification of the May 11, 1999 Order and on November 4, 1999, the Oklahoma Supreme Court issued its Order on Rehearing and limited the effectiveness of its pronouncement in the May 11, 1999 Order to a roughly six month period of time from the issuance of AG Opinion 96-84 until the date when the Oklahoma Legislature amended the subject statute to specifically allow for refinancing at the B Loan, rather than A Loan, rates of interest. The November 4, 1999 Order on Rehearing is appealable only to the United States Supreme Court.

The Due Process questions advanced in this Petition for A Writ of Certiorari were timely and properly raised throughout these proceedings. The District Court acknowledged the same by issuing the permanent injunction which the Oklahoma Supreme Court later dissolved. The Petition for Rehearing filed by the Petitioner again presented the Due Process claims, yet the Oklahoma Supreme Court nevertheless dissolved the injunction thereby ignoring the same.

REASONS FOR ALLOWING THE WRIT

This case presents this Court an opportunity to review the validity of: (i) the *retroactive* application of an Oklahoma Statute that unconstitutionally restricts the rate at which a B Loan may be refinanced when that same loan has no similar restriction at its inception, and (ii) an Oklahoma Attorney General Opinion that attempts to retroactively apply such unconstitutional rate ceilings to all loans made under the presumed, allowable finance charge in direct contravention to 27 years of industry and Department lending practices and statutory interpretation.

The May 11, 1999 Opinion as amended by the Order on Rehearing (the November 4, 1999 Opinion) (together, the "Order") issued by the Oklahoma Supreme Court should be reviewed for several reasons. Initially, the decision is not in accord with applicable decisions of this Court. Second, the decision involves a compelling public policy concern on an issue that will affect the constitutional rights of the hundreds of licensed B Lenders within Oklahoma. Third, the decision conflicts with federal court decisions from other jurisdictions.

For 27 years, the Department was the state agency in Oklahoma charged with oversight of the consumer finance industry. It is the agency allowed to, among other statutory powers: (i) educate consumers and the consumer finance industry; (ii) assemble annual industry statistics; (iii) conduct on-sight audits and examinations of consumer finance companies and order refunds to consumers who may have been overcharged excessive or unauthorized

charges; and; (iv) report to the Oklahoma legislature on matters impacting consumer credit issues, developments and practices.

During this period of Department supervision, two types of loans were made to consumers pursuant to the provisions of the U3C[1]: A Loans and B Loans. A Loans are typically lower interest, higher principal amount loans, while B Loans are characterized as higher interest, lower principal loans. Because the fixed costs of any loan are typically similar, B Loan rates are necessarily higher from a respective annual percentage rate ("APR") standpoint to allow for adequate recapture of those fixed costs.

B Loans often have shorter repayment terms as well and may be refinanced (*i.e.*, not paid in full, much like maintaining an outstanding balance on a credit card) with the borrower receiving back some funds from the refinanced amount at closing. A Loan and B Loan rates, terms, conditions and restrictions are *highly* regulated and believed to be some of the most straightforward methods of consumer credit financing. Oftentimes, the B Loan APR is less than the delinquency charge and APR charged by major credit card companies on credit cards. B Loans are believed by economists and scholars alike to be a substitute source of credit/capital for persons who do not otherwise have access to more traditional consumer capital markets or products offered by banks, credit unions,

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[1]The U3C was adopted in the following 10 states: Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah and Wyoming.

securities firms, insurance companies or credit card issuers.

At some point, and to curb perceived abuses by a very small percentage of rogue B Lenders, the administrator who preceded Respondent Earl Clark as Acting Administrator, broke 27 years of industry and Department practice by unilaterally "deciding" that a never before relied upon, obscure *footnote* to the B Loan rate statute placed there by a West publisher commentator, prohibited B Loan refinancings at B Loan rates.[2] Simply put, the Terminated Administrator took the position that if the industry did not compel the rogue B Lenders to "behave" as he saw fit, he would change the way he – and therefore the Department – "read the statute." Apparently, this was the Terminated Administrator's attempt at coercing behavior he deemed appropriate. Prior to this "new" interpretation of the old statute, no less than 6 previous Department administrators likewise interpreted and administered B Loan refinancings at B Loan rates in accord with industry expectations and understanding of what the law permitted.

It was during this transmutation of interpretation that the Terminated Administrator sought counsel from the state's highest law enforcement officer, the Oklahoma

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[2]That administrator (the "Terminated Administrator") was subsequently terminated by Oklahoma Governor Frank Keating for a number of reasons, including, without limitation, making public controversial comments about B Lenders generally and a perceived irrational enforcement method of B Loan provisions.

Attorney General. Soon thereafter, the Oklahoma Attorney General, in AG Opinion 96-84, formally adopted the Terminated Administrator's ill-conceived statutory countermand.

Upon issuance of AG Opinion 96-84, the B Lenders were notified by letter that the Department would *in futuro* begin to enforce the newly legitimized "interpretation" of the old law. Acknowledging the Department's errors and the concomitant erroneous interpretation in AG Opinion 96-84, the Oklahoma legislature immediately amended the B Loan provisions to specifically permit refinancings of B Loans at B Loan rates (referred to as the "Curative Amendment").

The District Court obviously recognized that the Department's and Attorney General's "new" interpretations were illegal when it granted the Petitioners their injunctive relief. The Oklahoma Supreme court did not, however, and held that B Loans, made prior to the Curative Amendment, could only be refinanced at the A Loan rates and that this "new" interpretation was *retroactive*! The net effect was that all B Lenders who made B Loans, which were later refinanced at B Loan rates rather than A Loan rates, would have to refund the difference in interest and charges to all borrowers. Upon Order denying rehearing (the November 4, 1999 Opinion) the refund "period" was limited to the 6 month period from the time of issuance of AG Opinion 96-84 to the date when the Oklahoma legislature adopted the Curative Amendment. Even with the limitation of refunds to B Loans made during a 6 month period of time, the

Oklahoma Supreme Court Order would not only be inequitable, but would violate Petitioners' due process rights. In refinancing B Loans pursuant to §3-508B, Petitioners relied on the longstanding interpretation of §3-205 by the Department, and then the District Court's order affirming that interpretation. Petitioners were acting pursuant to applicable law at all times. They had no notice that the statute could or would be interpreted in any other way until the Opinion was rendered. However, Petitioners immediately filed suit in District Court, which enjoined enforcement of the AG Opinion by the Department. The final construction of a statute rests with the courts and the Opinion is not controlling, although it is given great respect. *State ex. rel. Clifton v. Reeser,* 543 P.2d 1379 (Okla. 1975). Thus, should the Order be applied retroactively, in any respect, it would impose a duty with which Petitioners have had no prior notice or opportunity to comply. In addressing the issue of notice, this Court has stated:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Oklahoma has adopted the federal test for determining whether a statute provides sufficient notice to those upon whom it imposes duties. *In re Daniel, Deborah and Leslie H.,* 591 P.2d 1175, 1177 (Okla. 1979). Adopting the federal test, the Oklahoma Supreme Court stated:

> The accepted federal law test of vagueness is whether the language of the enactment conveys, with respect to conduct one is expected to follow, sufficiently definite warning so that men "of common intelligence or understanding" will not have to guess at the statute's meaning.

Id. The Order is clearly contrary to the interpretation of the industry, the Department (prior to the Terminated Administrator's and Acting Administrator's "new" interpretation), and the District Court, all of whom are certainly of at least "common intelligence or understanding." It would therefore be inconsistent with the federal test described above to hold Petitioners liable for failing to adhere to a statutory construction so strained that no one would have "guessed" the statute could be read as Respondents read it. The Order is directly contrary to both the common understanding and the 27 year practice of the Oklahoma small loan lending industry. Consequently, the Order imposes a duty with which neither Petitioners nor any other Oklahoma supervised lender had sufficient notice, and imposing liability on them retroactively would blatantly violate their right to due process.

The Tenth Circuit recognizes that Petitioners are entitled to adequate notice of laws for which they may be held liable:

> The test for determining whether the retroactive application of a judicial decision violates due process is essentially one of foreseeability. A decision is unforeseeable if it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue."

U.S. v. Morehead, 959 F.2d 1489, 1512 (10th Cir. 1992) (quotation omitted). This reasoning is directly applicable here, because the Order overrules 27 years, and no less than 6 different administrators, of agency interpretation and enforcement of the statutes at issue as to which the legislature not only acquiesced, but also recently confirmed. Petitioners had every right to rely on the law as it had been uniformly interpreted and administered by the Department charged with its enforcement. Thus, in light of the interpretation of the Department, the District Court, and the legislature, Petitioners have justifiably relied upon Oklahoma law in conducting their business and the Order must, on due process grounds, not be applied retroactively.

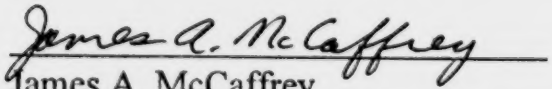
To apply the Order retroactively would result in the taking of the Petitioners' property without due process of law in violation of the Fourteenth Amendment to the *United States Constitution* and Article 2, Sections 7 and 15 of the *Oklahoma Constitution.* In reliance on the

Department's longstanding interpretation of the statute, Petitioners made a huge economic investment in establishing and maintaining their loan offices in Oklahoma. If they are forced to make refunds on loans refinanced prior to the Curative Amendments taking effect, it could cost Petitioners millions of dollars; result in the closing of their business; resulting in an unconstitutional taking of their property; prevent their customers from accessing possibly their only source of alternative credit; and, generally bless the irrational conduct of the Terminated Administrator that began this treacherous legal imbroglio.

CONCLUSION

For the above reasons, Petitioners request that this Court grant a Writ of Certiorari to the Supreme Court of Oklahoma.

Respectfully submitted,



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APPENDIX "A"

FILED
November 4, 1999
Supreme Court State of Oklahoma
James W. Patterson, Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

INDEPENDENT FINANCE INSTITUTE, ET AL.,	)	
Plaintiffs/Appellees.	)	
v.	)	No. 89,504
EARL CLARK, ACTING ADMINISTRATOR, OKLAHOMA DEPARTMENT OF CONSUMER CREDIT, and the OKLAHOMA DEPARTMENT OF CONSUMER CREDIT,	)	
Defendants/Appellants.	)	

ORDER ON REHEARING

¶1 Rehearing in the above style matter is granted for the limited purpose of clarifying paragraph number 21 and footnote 44 of the opinion promulgated on May 11, 1999. Rehearing is denied for all other purposes. Paragraph

number 21 and footnote 44 of the opinion is replaced with the following:

> ¶21 However, we also realize that the Department's interpretation was relied upon by the industry for twenty-seven years, and that only six months lapsed from the time the Attorney General issued an opinion until the new legislative amendments became effective. Consequently, our pronouncement should apply to section 3-508B loans refinanced between March 3, 1997, and August 29, 1997. Because the remedy sought in this suit was declaratory judgment and an injunction, we need not address the propriety of refunds of excess charges."

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[1]"See, Great Northern RR v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932); First of McAlester Corp. v. Oklahoma Tax Comm'n. 1985 OK 52, ¶21, 709 P.2d 1026, 1033. The decision in this case establishes a new principle of law which was not foreshadowed until the Attorney General issued his opinion and the Administrator sent notification that he was going to enforce the Attorney General's opinion. See First of McAlester, 1985 OK at ¶24, 709 P.2d at 1034. We find no hardship or inequity in applying this decision to refinancing agreements entered into after the Administrator gave notice on March 3, 1997. After the letter of enforcement was sent, lenders were on notice that the lesser charges of subsection 3-508A might apply to refinancing of subsection 3-508B loans. See, id. At ¶30, 709 P.2d at 1035."

¶2 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 4th day of November, 1999.

/s/ Hardy Summers
Chief Justice

¶3 Summers, C.J., Hodges, Kauger, Watt, Boudreau, J.J., concur.

¶4 Hargrave, V.C.J., Lavender, Opala, J.J., dissent.

APPENDIX "B"

FILED
May 11, 1999
Supreme Court State of Oklahoma
James W. Patterson, Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

INDEPENDENT FINANCE INSTITUTE, ET AL.,	)	
Plaintiffs/Appellees,	)	No. 89,504
v.	)	
EARL CLARK, ACTING ADMINISTRATOR, OKLAHOMA DEPARTMENT OF CONSUMER CREDIT, and the OKLAHOMA DEPARTMENT OF CONSUMER CREDIT,	)	
Defendants/Appellants.	)	

Honorable Bryan D. Dixon, Trial Judge

¶0 The Oklahoma Department of Consumer Credit requested an opinion from the Attorney General regarding the refinancing of supervised loans initially made pursuant to 14A O.S. 1991 §3-508B. The Attorney General issued an opinion finding that lenders who issue loans under §3-508B may not impose the same finance charges allowed under §3-508B when refinancing loans. Rather, pursuant to 14A O.S. 1991 §3-205, lenders are limited to assessing charges permitted under 14A O.S. 1991 §3-508A when refinancing a §3-508B loan. After the Department notified lenders that it would begin enforcing the Attorney General's opinion, the lenders filed a declaratory judgment action in district court. The trial court, the Honorable Bryan D. Dixon, issued a permanent injunction, finding that lenders may receive charges permitted by §3-508B when refinancing loans originally made under that section. Subsequently, the Department appealed. We hold that because of the strictures of 14A O.S. 1991 §3-205, lenders who refinance supervised loans, whether initially made under either §3-508A or §3-508B, are limited to assessing loan finance charges permitted by 14A O.S. 1991 §3-508A. However, the Legislature amended §§3-205 and 3-508B in May of 1997. The amended version of § 3-205, which became effective

on August 29, 1997, specifically refers to §3-208A and excludes § 3-208B, while §3-508B now includes its own refinancing provisions, and provides for rebates of charges upon refinancing.

TRIAL COURT REVERSED.
PERMANENT INJUNCTION DISSOLVED.

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¶ 1 KAUGER, J.:

¶2 In 1969, the Oklahoma Legislature enacted the Oklahoma Consumer Credit Code, the (the Code) 14A O.S. 1991 §§1-101 et seq. This first impression question concerns the regulation and refinancing of supervised

loans and supervised lenders under the Code. Supervised loans are consumer loans in which the rate of the loan finance charge exceeds ten percent per year.[1] Supervised lenders are persons who make supervised loans.[2]

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[1]Title 14A O.S. 1991 §3-501 provides:

"(1) 'Supervised loan' means a consumer loan in which the rate of the loan finance charge exceeds ten percent (10%) per year as determined according to the provisions on loan finance charge for consumer loans (Section 3-201).

(2) 'Supervised lender' means a person authorized to make or take assignments of supervised loans."

[2]Id.

¶3 Title 14A O.S. 1991 §3-508A[3] of the Code covers large supervised loans and allows lenders to contract for a loan finance charge when making a loan.

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[3]Title 14A O.S. 1991 §3-508A provides in pertinent part:

"(1) With respect to a supervised loan, including a loan pursuant to a revolving loan account, a supervised lender may contract for and receive a loan finance charge not exceeding that permitted by this section.

(2) The loan finance charge, calculated according to the Actuarial Method, may not exceed the equivalent of the greater of either of the following:

(a) the total of

(i) thirty percent (30%) per year on that part of the unpaid balances of the principal which is Three Hundred Dollars ($300.00) or less;
(ii) twenty-one percent (21%) per year on that part of the unpaid balances of the principal which is more than Three Hundred Dollars ($300.00) but does not exceed One Thousand Dollars ($1000.00); and
(iii) fifteen percent (15%) per year on that part of the unpaid balances of the principal which is more than One Thousand Dollars ($1000.00); or

(b) twenty-one percent (21%) per year on the unpaid balances of the principal.

. . ."

This statute was amended in 1997, see discussion p.10, infra.

Section 3-508B[4] of the Code deals with small supervised

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[4]Title 14A O.S. 1991 §3-508B provides in pertinent part:

"(1) On loans having a cash advance of One Hundred Dollars ($100.00) or less, a supervised lender may charge in lieu of the loan finance charges specified in Section 3-508A, the following amounts:

(a) on any amount up to and including Twenty-nine Dollars and ninety-nine cents ($29.99), a charge may be added at the ratio of One Dollar ($1.00) for each Five Dollars ($5.00) cash advanced to the borrower;

(b) on any cash advance in an amount in excess of Twenty-nine Dollars and ninety-nine cents ($29.99) up to and including the amount of Thirty-five Dollars ($35.00), there shall be allowed an acquisition charge for making the advance not in excess of 1/10 of the amount of the cash advanced. In addition thereto, an installment account handling charge shall be allowed not exceed Three Dollars ($3.00) per month;

. . .

(2) The maximum term of any loan made under the terms of this section shall be one (1) month for each Ten Dollars ($10.00) of cash advance up to a maximum term of ten (10) months. Provided, however, that under subsections (e) and (f) the maximum terms shall be one (1) month for each Twenty Dollars ($20.00) of cash advance up to a maximum term of ten (10) months.

. . .

(4) The acquisition charge authorized herein shall be deemed to be earned at the time a loan is made and shall not be subject o refund. On the prepayment of any loan under this section, the installment account handling charge shall be

loans which are limited to no more than $640.00. Section 3-508B permits lenders to collect an acquisition charge and an installment account handling charge when making a loan under this section *in lieu of the lower loan finance charges which are available to large lenders under §3-508A.*

¶4 Title 14A O.S. 1991 §3-205 of the Code, which governs refinancing of consumer loans, provides that refinancing charges for supervised loans are limited pursuant to "the provision on loan finance charge for supervised loans (Section 3-508)."[5] Although Oklahoma's

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subject to the provisions of Section 3-210 as it relates to refunds. Provisions of Section 3-203 as it relates to delinquency charges and Section 3-204 as it relates to deferral charges shall apply to loans made under the section."

Section 3-508B(1) refers to loans having a cash value of one hundred dollars ($100.00) or less. This was the language included in the 1969 adoption of the Consumer Credit Code. Title 14A O.S. 1991 §1-106, first adopted in 1979, provides that the dollar amounts in §3-508A(2)(a) and §3-508(1) be adjusted annually for inflation. The dollar amount of $640.00 was in effect when the Attorney General issued his Opinion. This statute was amended in 1997, see discussion p.10, infra.

[5]Title 14A O.S. 1991 §3-205 provides in pertinent part:

"With respect to a consumer loan, refinancing, or consolidation, the lender may by agreement with the debtor refinance the unpaid balance and may contract for and receive a loan finance charge based on the principal resulting from the refinancing at a rate not exceeding that permitted by

version of the Uniform Code contains a §3-508A and a §3-508B, it has not §3-508. Because the statute as enacted referred to a non-existent §3-508,[6] apparently in an attempt to clear up confusion, the publisher of the 1969 Session Laws added a footnote to the statute indicating that the reference to §3-508 "[s]hould read Section 3-508A" when it published the statute. Accordingly, the dispositive issue presented[7] is whether lenders who refinance supervised

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> the provisions on loan finance charge for consumer loans (Section 3-201) or *the provision on loan finance charge for supervised loans (Section 3-508),*[1] *whichever is appropriate.*
>
> . . .
>
> [1]Should read "(Section 3-508A)"" (Emphasis supplied.)

[6]The version of 14A O.S. 1991 §3-205, which was signed by the Governor on May 8, 1969, does not contain a footnote that reads "Should read (Section 3-508A)." Rather, the publisher of the 1969 Session Laws added the footnote and the corresponding language when it published the statute, apparently in an attempt to clear up confusion because the statute as enacted referred to a §3-508 which did not exist. 1969 Okla. Sess. Laws Ch. 352. This same language was included in the 1971, 1981, and 1991, compilations of the statutes. See 14A O.S. 1971 §3-205; 14A O.S. 1981 §3-205; 14A O.S. 1991 §3-205. The same correction was made to 14A O.S. 1991 §§3-206 and 3-208 of the Code which govern consolidation and other advances of supervised loans, respectively.

[7]The Department, in addition to appealing the trial court's award of costs, also asserts that: 1) the Independent Finance Institute and the Oklahoma Small Loan Association cannot have standing because they are not supervised lenders under the Code and are therefore not directly affected by the Attorney General Opinion; and 2) the lenders failed to first exhaust their administrative remedies before filing suit. We find both of these arguments without merit.

loans are restricted by the finance charges set forth in 14A O.S. 1991 §3-508A or §3-508B.[8] We hold that because of the strictures of 14A O.S. 1991 §3-205,[9] lenders who refinance supervised loans, whether initially made under either §3-508A or §3-508B, are limited to assessing loan finance charges permitted by §3-508A.

FACTS

¶5 Since the Oklahoma Consumer Credit Code's adoption in 1969, the Oklahoma Department of Consumer Credit, (the Department) had allowed supervised lenders to refinance supervised loans and charge fees assessed

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This Court has recognized that an association can have standing to seek relief on behalf of its members. State ex rel. Henry v. Southwestern Bell Telephone Co., 1991 OK 134, ¶8-9, 825 P.2d 1305, 1309; Private Truck Council of America, Inc. v. Oklahoma Tax Com'n., 1990 OK 54, ¶31, 806 P.2d 598, 607, *vacated and remanded on other grounds by* National Private Truck Council, Inc. v. Oklahoma Tax Com'n., 115 L.Ed.2d 1048, 501 U.S. 1247, 111 S.Ct. 2882 (1991); Missouri-Kansas Texas R.R. v. State, 1985 OK 108, ¶19, 712 P.2d 40, 42; Democratic Party of Oklahoma v. Estep, 1982 OK 106, ¶7-8; 652 P.2d 271, 274. Although exhaustion of administrative remedies is a prerequisite for resort to the courts as a general rule, this cause was brought pursuant to 75 O.S. 1991 §706(D) which dispenses with the exhaustion requirement.

[8]Title 14A O.S. 1991 §3-508A, see note 3, supra; 14A O.S. 1991 §3-508B, see note 4, supra.

[9]Title 14A O.S. 1991 §3-205, see note 5, supra.

under either §3-508A[10] or §3-508B,[11] depending on which statute the loan was initially made.

¶6 On August 1, 1996, the appellant, the Administrator of the Department requested a formal opinion from the Attorney General asking for a determination of whether it had been properly enforcing § 3-205 insofar as the refinancing of supervised loans was concerned. On February 20, 1997, in response to the inquiry,[12] the Attorney General issued Opinion No. 96-84, finding that lenders who issue loans under §3-508B may not impose the same finance charges allowed under §3-508B when refinancing loans. The opinion held that pursuant to 14A O.S. 1991 §3-205, lenders are limited to assessing charges permitted under §3-508A when refinancing a §3-508B loan.[13] After the Attorney General's opinion, the Administrator notified lenders that enforcement of the opinion would not begin until March 3, 1997.

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[10]Title 14A O.S. 1991 §3-508B, see note 4, supra.

[11]Title 14A O.S. 1991 §3-508A, see note 3, supra.

[12]The Administrator's inquiry provided:

"When refinancing a small consumer loan - that is, a loan of less than $640 - may supervised lenders, un the provisions of 14A O.S. 1991, §3-508B, impose an acquisition charge or an installment account handling charge in lieu of the less costly finance charge permitted under 14A O.S. 1991 §3-508A?"

[13]Title 14A O.S. 1991 §3-508A, see note 3, supra.

¶7 After receiving the Administrator's letter, the Independent Finance Institute and twenty-seven lenders, filed an action in the district court of Oklahoma County on February 27, 1997. The cause was brought pursuant to the declaratory judgment provision of the Oklahoma Administrative Procedures Act, 75 O.S. 1991 §706.[14] The lenders argued that the Department's twenty-seven year interpretation of the statute controlled, and that they should be allowed to continue to refinance loans and charge fees assessed under §3-508B rather than being confined to the limits of §3-508A. They sought a permanent injunction and a temporary restraining order to restrain the Department from implementing the Attorney General's opinion. The next day, the district court issued a temporary restraining order, prohibiting the Department from implementing or acting upon the Attorney General Opinion.

¶8 On March 7, 1997, the Oklahoma Small Loan Association and three additional lenders intervened and joined in the lawsuit. The trial court entered a declaratory judgment on April 30, 1997, and it issued a permanent injunction finding that the Code permits lenders to contract and receive finance charges permitted under 14A O.S. 1991 §3-508B when refinancing, consolidating, or making advances under loans originally made under §3-508B.[15] On May 30, 1997, the Administrator, on behalf of

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[14]See, 75 O.S. 1991 §706.

[15]Title 14A O..S. 1991 §3-508B, see note 4, supra. After the trial court's ruling, two of the lenders filed a motion for costs,

the Department sought review of the trial court's declaratory judgment.

> **¶9 BECAUSE OF THE STRICTURES OF 14A O.S. 1991 §3-205, LENDERS WHO REFINANCE SUPERVISED LOANS, WHETHER INITIALLY MADE UNDER EITHER §3-508A OR §3-508B, ARE LIMITED TO ASSESSING LOAN FINANCE CHARGES PERMITTED BY 14A O.S. 1991 §3-508A. HOWEVER, THE LEGISLATURE AMENDED §§3-205 AND 3-508B IN MAY OF 1997. THE AMENDED VERSION OF § 3-205, WHICH BECAME EFFECTIVE ON AUGUST 29, 1997, SPECIFICALLY REFERS TO §3-508A AND EXCLUDES §3-508B, WHILE §3-508B NOW INCLUDES ITS OWN REFINANCING PROVISIONS, AND PROVIDES FOR REBATES OF CHARGES UPON REFINANCING.**

¶10 Section 3-508A[16] of the Oklahoma Consumer Credit Code, allows lenders to contract for a loan finance

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seeking $567.00 for costs and expenses in bringing this action. On July 23, 1997, the trial court awarded the lenders $407.00 in costs. On August 19, 1997, the Department amended its petition in error to include an appeal of the trial court's award of costs. Because we find that the trial court erred in reversing the Attorney General's opinion, we need not determine whether the trial court properly awarded costs to the lenders.

[16]Title 14A O.S. 1991 §3-508A, see note 3, supra.

charge when making a loan under this section. Section 3-508B[17] permits lenders to collect an acquisition charge and an installment account handling charge when making a loan under this section *in lieu of the lower loan finance charges which are available to large lenders under §3-508A.* Sections 3-205, 3-206, and 3-208 of the Code govern refinancing, consolidation, or other advances of supervised loans, respectively.[18] This controversy centers around supervised loan refinancing.[19]

¶11 Section 3-205 provides in pertinent part:

> "With respect to a consumer loan, refinancing, or consolidation, the lender may by agreement with the debtor refinance the unpaid balance and may contract for and receive a loan finance charge based on the

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[17]Title 14A O.S. 1991 §3-508B, see note 4, supra. Section 3-508B limits small supervised loans to a maximum term of ten months and makes no reference to refinancing within its confines.

[18]See, 14A O.S. 1991 §3-205; 14A O.S. 1991 §3-206; and 14A O.S. 1991 §3-208.

[19]It has been argued that the charges assessed under 14A O.S. Supp. 1998 §3-508B, especially in the event of refinancing, violate the Oklahoma Constitution, art. XIV, §2 because there is no fixed maximum rate of interest. See Suzanne E. Schreiber, "If There is No Rate, You Must Rebate: Small Loan Laws in Oklahoma," 34 Tul. L. J. 409 (1999). Apparently, this issue is pending in the lower courts as well, however, this constitutional question was not presented by the issues raised in this appeal and was not asserted by the parties. Consequently, we need not decide the issue today.

principal resulting from the refinancing at a rate not exceeding that permitted by the provisions on loan finance charge for consumer loans (Section 3-201) or *the provisions on loan finance charge for supervised loans (Section 3-508),*[1] *whichever is appropriate.*

. . .

[1]Should read "(Section 3-508A)" " (Emphasis supplied.)

¶12 It is undisputed that Oklahoma's version of the Uniform Code does not contain a §3-508, and that the publisher of the 1969 Session Laws added a footnote to the statute indicating that the reference to § 3-508 "[s]hould read Section 3-508A."[20] In contravention of its long-standing policy, the Department asserts that the Attorney General's opinion is correct and that when refinancing a small supervised consumer loan made under the provisions of §3-508B, lenders are limited to assessing the loan finance charges permitted by §3-508A. The lenders argue that the Department's twenty-seven year interpretation of the statute is controlling and that lenders are allowed to refinance loans and charge fees assessed under §3-508B, rather than being confined to the limits of §3-508A.[21]

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[20]See discussion, note 6, supra.

[21]The lenders cite to 75 O.S. 1991 §12 in support of their proposition that the footnotes are not part of the statute. Section 12 provides:

¶13 We disagree with the lender's contention. Generally, construction of an ambiguous or uncertain statute by an administrative agency charged with its administration, although not controlling, is entitled to the highest respect from the courts ----- especially when construction is definitely settled and uniformly applied for a number of years. We do not intend to ignore, abrogate or diminish this rule of construction. However, the construction given must have been reasonable and not clearly wrong.[22] This case does not belong in the line of cases which hold that long-standing enforcement by an administrative agency is entitled to great weight. Here, the Department has conceded that the Attorney General's opinion set forth the correct interpretation of Oklahoma law. Although this reason standing alone might not be

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> "In all cases where there is a conflict between the original acts and adopted statutes, the original acts shall govern, and the adopted statutes shall be deemed as repealed, amended, or modified thereby, without reference to the date of the approval of such original acts. For purposes of this section, 'original acts' means the enrolled documents of the acts as produced by the house of origin."

We find this statute not helpful here. The original act referred to a section that does not exist. The adopted statute referred to the same section. The footnote, which was first added when the session laws were published, merely attempted to clarify the legislative oversight.

[22]Hendrick v. Walters, 1993 OK 162, ¶17, 865 P.2d 1232, 1241-42; Oral Roberts Univ. v. Oklahoma Tax Com'n, 1985 OK 97, ¶9, 714 P2d 1013, 1014-15; Berry v. Public Empl. Retirement System, 1989 OK 14, ¶8, 768 P.2d 898, 900.

sufficient to reach this result, there are other factors which require that we reach the same conclusion as that of the Attorney General.

¶14 The determination of legislative intent controls statutory interpretation.[23] The intent is ascertained from the whole act in light of its general purpose and objective.[24] In construing statutes, relevant provisions must be considered together whenever possible to give full force and effect to each.[25] To ascertain legislative intent we look to the language of the pertinent statutes.[26] Doubt as to the meaning of a statute may be resolved by reference to its enacted history.[27]

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[23]Smicklas v. Spitz, 1992 OK 145, ¶8, 846 P.2d 362, 366; Clifton v. Clifton, 1990 OK 88, ¶7, 801 P.2d 693, 696; Fuller v. Odom, 1987 OK 64, ¶4, 741 P.2d 449, 452.

[24]McSorley v. Hertz Corp., 1994 OK 120, ¶6, 885 P.2d 1343, 1346; Oglesby v. Liberty Mut. Ins. Co., 1992 OK 61, ¶8, 832 P.2d 834, 839; Smicklas v. Spitz, see note 23, supra.

[25]Haney v. State, 2993 OK 42, ¶5, 850 P.2d 1087; Public Serv. Co. of Okla. V. State ex rel. Corp. Com'n, 1992 OK 153, ¶8, 842 P.2d 750, 752.

[26]Tate v. Browning-Ferris, Inc., 1992 OK 72, ¶15, 833 P.2d 1218, 1228; State ex rel. Macy v. Freeman, 1991 OK 59, ¶8, 814 P.2d 147, 153.

[27]McNeill v. City of Tulsa, 1998, OK 2, ¶9, 953 P.2d 329, 331; City of Hugo v. State ex rel. Public Employees Relations Bd., 1994 OK 134, ¶15, 886 P.2d 485, 492; Berry v. State ex rel. Okla. Public Employees Retirement System, 1989 OK 14, ¶5, 768 P.2d 898, 899.

¶15 When the Oklahoma Code was first adopted in 1969, it was based primarily on the Uniform Consumer Credit Code. However, Oklahoma's version contained more than two hundred legislative amendments, customizing it for Oklahoma.[28] Once such amendment was Oklahoma's creation of §§3-508A and 3-508B. Although the Uniform Code's §3-508 is nearly identical to Oklahoma's 3-508A,[29] the Uniform Code has no provision similar to Oklahoma's §3-508B. Nevertheless, when the Legislature adopted §3-205 of the Code, which governs refinancing of consumer and supervised loans, the statute made reference to a non-existent §3-508. Section §3-205 provides that refinancing charges for supervised loans are limited pursuant to "the provision on loan finance charge for supervised loans (Section 3-508)."[30] Accordingly, it is unclear from this reference to the non-existent §3-508, whether, when a supervised lender refinances a consumer loan, it may only impose a loan finance charge in accordance with §3-508A, or whether it can collect the more costly acquisition charges and installment account handling charges allowed under §3-508B.

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[28]See, Bryce A. Baggett and Fred H. Miller, "The Oklahoma Version of the Uniform Consumer Credit Code," 1969, printed at 14A O.S.A. at page 2, as part of the introduction to the Oklahoma Consumer Credit Code.

[29]Title 14A O.S. 1991 §3-508A, note 3, supra; See U.C.C.C. §3-508 (1968).

[30]Title 14A O.S. 1991 §3-205, see note 5, supra.

¶16 A subsequent amendment to an act can be used to ascertain the meaning of a prior statute.[31] Where the meaning of a prior statute is subject to serious doubt and has not been judicially determined, the presumption arises that a subsequent amendment was meant to clarify, as opposed to change the prior statute.[32] In 1997, the Legislature addressed the oversight created by §3-205's reference to the non-existent §3-508, and in May of 1997, amended §§3-205, and 3-508B. The new version of §3-205,[33] which became effective on August 29, 1997,

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[31]Quail Creek Golf v. Oklahoma Tax Com'n, 1996 OK 35, ¶10, 913 P.2d 302, 304; See, Texas County Irrigation & Water Resources Ass'n v. Oklahoma Water Resources Bd., 1990 OK 121, 803 P.2d 1119, 1122; Board of Educ. v. Morris, 1982 OK 142, 656 P.2d 258, 261; Magnolia Pipe Line Co. v. Oklahoma Tax Com'n, 196 Okla. 663, 167 P.2d 884, 888 (1946).

[32]Quail Creek Golf v. Oklahoma Tax Com'n, see note 31, supra; Texas County Irrigation & Water Resources Ass'n v. Oklahoma Water Resources Bd., see note 31, supra; Board of Educ. v. Morris, see note 31, supra; Magnolia Pipe Line Co. v. Oklahoma Tax Com'n, see note 31, supra.

[33]Title 14A O.S. Supp. 1998 §3-205 provides in pertinent part:

> "With respect to a consumer loan, refinancing, or consolidation, other than one made under Section 3-508B of this title, the lender may by agreement with the debtor refinance the unpaid balance and may contract for and receive a loan finance charge based on the principal resulting from the refinancing at a rate not exceeding that permitted by the provisions on loan finance charge for consumer loans (Section 3-201) or the provisions on loan finance charge for

specifically refers to § 3-508A and excludes §3-508B, while §3-508B now includes its own refinancing provisions, and provides for rebates of charges upon refinancing. It expressly limits the acquisition charges and installment account handling charges when a loan is refinanced.[34] Although not dispositive, these

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supervised loans (Section 3-508A), whichever is appropriate. For the purpose of determining the loan finance charge permitted, other than in relation to Section 3-508B, the principal resulting from the refinancing comprises the following: . . ."

[34]Title 14A O.S. Supp 1998 §3-508B provides in pertinent part:

". . .

(4) Loans made under this section may be refinanced or consolidated according to the provisions of this section, notwithstanding anything in this act to the contrary. When a loan made under this section is refinanced or consolidated, installment account handling charges on the loans being refinanced or consolidated must be rebated pursuant to the provisions regarding rebate on prepayment (Section 3-210) as of the date of refinancing or consolidation. For the purpose of determining the amount of acquisition and installment account handling charges permitted in relation to the refinancing or the consolidation of loans made under this section, the principal resulting from the refinancing or consolidation is the total of the unpaid balances of the principal of the loans being refinanced or consolidated, plus any new money advanced, and any delinquency or deferral charges if due and unpaid, less any unearned acquisition and installment account handling charges imposed in connection with loans being refinanced or consolidated.

. . ."

housekeeping amendments support the Department's position.

¶17 Oklahoma's Code, unlike the Uniform Code, creates a dichotomy between large supervised loans and small supervised loans.[35] Because the size of a small supervised loan is so small, supervised lenders are allowed to charge acquisition charges and installment account handling charges in lieu of the lower loan finance charge.[36] When a loan is prepaid, the lenders are allowed to keep the acquisition charge under Oklahoma's version of the Code, and only a portion of the installment account handling charge must be refunded.[37]

¶18 If the reference in §3-205 were, as the lenders argue, read to allow small supervised lenders to refinance loans under the provisions of §3-508B, they would recover acquisition fees and installment account handling charges each time the loans are refinanced. The purpose of the Code is to protect consumers and encourage the development of fair and economically sound consumer credit practices.[38] Had the Legislature intended such a

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[35]Title 14A O.S. 1991 §§3-508A and 3-508B, see notes 3 and 4, supra.

[36]Title 14A O.S. 1991 §3-508B, see note 4 supra.

[37]Id.

[38]Title 14A O.S. 1991 §1-102 provides in pertinent part:

"(1) This act shall be liberally construed and applied to

lucrative result on the part of small loan lenders at the

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promote its underlying purposes and policies.

(2) The underlying purposes and policies of this act are

. . .

> (c) to further consumer understanding of the terms of credit transactions and to foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost;
>
> (d) to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors;
>
> (e) to permit and encourage the development of fair and economically sound consumer credit practices;

. . ."

expense of consumers,[39] it could have specifically provided so within the confines of §3-508B, but it did not.

¶19 Rather, the Legislature provided small supervised lenders the benefit of acquisition charges and installment account handling charges when initiating a loan, without requiring a refund of the acquisition charges.[40] It appears that the trade off for this benefit is

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[39]The Attorney General's opinion provides an example of how lenders would reap such a lucrative benefit by refinancing §3-508B loans under that section. It provides in pertinent part:

> "Instead of paying off their loans in full, many small supervised loan borrowers simply refinance the remaining debt, pay accrued charges, and either receive additional cash representing any principal they have repaid on the loan or simply extend the term of the loan. For example, a borrower who desires to receive $100 on a one-month note will be charged a $10 acquisition charge and a $9.60 installment account handling charge, for a total amount of $119.60 due in one month. If, on the due date, the borrower is unable to pay the entire $119.60, such a borrower often will refinance the note by simply paying the accrued charges of $19.60, in which case the amount owed at the end of the second month is once again $119.60. If this is repeated each month for a year, the borrower will have paid a total of $235.20 in acquisition charges and installment account handling charges, and still owe $119.60. The resulting effective annual percentage rate is 235.2%.

[40]Title 14A O.S. 1991 §3-508B, see note 4, supra.

that when the small supervised loans are refinanced, they are limited to assessing only the loan finance charges under §3-508A. The Legislature had the opportunity to change the statute before the recodification on 1971, but failed to do so.[41] The Legislature failed to amend §3-205 of the Code from 1969 until 1997.[42] Apparently, when the Legislature became aware of the statutory inconsistency it amended §3-205 to specifically refer to §3-508A and to exclude §3-508B,[43] expressly limiting the acquisition charges and installment account handling charges when a loan is refinanced.

¶20 Obviously, the Legislature originally intended, as the publisher of the 1969 Session Laws indicated by a footnote to the statute that the reference to §3-508 "[s]hould read Section 3-508A." It is undisputed that the publisher inserted the footnote to §3-205 to clarify any ambiguity in the Code. The Department asserts that the footnote became part of the statute by the Legislature's codification process. The Lenders insist that the footnote never became part of the statute. Generally, a publisher's correction becomes part of the statute if, as here, the publisher did not change the substantive meaning of the

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[41]Title 14A O.S. 1971 §3-205.

[42]Title 14A O.S. 1981 §3-205; 14A O.S. 1991 §3-205; 14A O.S. Supp. 1998 §3-205, see note 33, supra.

[43]Title 14A O.S. Supp. 1998 §3-205, see note 33, supra.

statute as it was originally intended by the Legislature.[44] Accordingly, when refinancing a small supervised consumer loan made under the prior provisions of §3-508B, lenders are limited to assessing the loan finance charges permitted by §3-508A. However, the Legislature, in May of 1997, amended §§3-205 and 3-508B, while §3-508B now includes its own refinancing provisions, and provides for rebates of charges upon refinancing.

¶21 However, we also realize that the Department's interpretation was relied upon by the industry for twenty-seven years, and that only six months lapsed from the time the Attorney General issued an opinion until the new legislative amendments became effective. Consequently, our pronouncement should be given effect in the

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[44]Title 75 O.S. 1991 §171 authorizes West Publishing Company to compile, codify and annotate the Oklahoma Statutes according to the terms, specifications and conditions directed by the Speaker of the House of Representatives and the President Pro Tempore of the Senate. See, Protection Mut. Ins. Co. v. Kansas City, 504 S.W. 2d 127, 130 (Kansas 1974) (Recognizing that absent a legislative act amending a law, statute revisors have not authority to change the substantive meaning and application of a law or its purpose and intent, and that any subsequent revision purporting to effect such a change is ineffective and the law as originally enacted must be construed and applied to accomplish the original legislative intent and purpose.); See also City of Ouray v. Olin, 761 P.2d 784, 791 (Colo. 1988) (Addition of words by revisor was not substantive change, but, rather, clarification of language making statute conform to commonly understood legislative intent.).

immediate cause and to all cases already in the appellate pipeline.[45]

CONCLUSION

¶22 The purpose of the Code is to protect consumers and encourage the development of fair and economically sound consumer credit practices.[46] Because of the strictures of 14A O.S. 1991 §3-205, lenders who refinance supervised loans, whether initially made under either §3-508A or §3-508B, are limited to assessing loan finance charges permitted by 14A O.S. 1991 §3-508A. However, the amended version of §3-205, which became effective on August 29, 1997, specifically refers to §3-208A and excludes §3-208B, while §3-508B now includes its own refinancing provisions, and provides for rebates of charges upon refinancing.

¶23 TRIAL COURT REVERSED.
PERMANENT INJUNCTION DISSOLVED.

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[45]See, DuLaney v. Oklahoma State Dept. of Health, 1993 OK 113, ¶20, 868 P.2d 676, 685; Short v. Kiamichi Area Vocational Technical School Dist. No. 7, 1988 OK 89, ¶21, 761 P.2d 472, 478-479, cert. denied, 489 U.S. 1066, 109 S.Ct. 1341, 103 L.Ed.2d 811 (1989); Carlile Trust v. Cotton Petroleum Corp., 1986 OK 16, ¶16, 732 P.2d 438, 445, cert. denied, 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738; Thompson v. Presbyterian Hosp. Inc., 1982 OK 87, ¶32-33, 652 P.2d 260, 268.

[46]Title 14A O.S. 1991 §1-102, see note 38, supra.

Summers, C. J., Hodges, Wilson Kauger, Watt, JJ., concur.

Hargrave, V.C.J., Lavender, Simms, Opala, JJ., dissent.

APPENDIX "C"

RELEVANT PORTIONS OF THE OKLAHOMA UNIFORM CONSUMER CREDIT CODE

Okla.Stat.tit. 14A §3-205

Title 14A O.S. 1991 §3-205 provides in pertinent part:

"With respect to a consumer loan, refinancing, or consolidation, the lender may by agreement with the debtor refinance the unpaid balance and may contract for a receive a loan finance charge based on the principal resulting from the refinancing at a rate note exceeding that permitted by the provisions on loan finance charge for consumer loans (Section 3-201) or *the provisions on loan finance charge for supervised loans (Section 3-508)*[1] *whichever is appropriate.*

. . .

[1]Should read "(Section 3-508A)"" (Emphasis supplied.)

The version of 14A O.S. 1991 §3-205, which was signed by the Governor on May 8, 1969, does not contain a footnote that reads "Should read (Section 3-508A)." Rather, the publisher of the 1969 Session Laws added the footnote and the corresponding language when it published the statute, apparently in an attempt to clear up confusion because the statute as

enacted referred to a §3-508 which did not exist. 1969 Okla. Sess. Laws Ch. 352. This same language was included in the 1971, 1981, and 1991, compilations of the statutes. See, 14A O.S. 1971 §3-205; 14A O.S. 1981 §3-205; 14A O.S. 1991 §3-205. The same correction was made to 14A O.S. 1991 §§3-206 and 3-208 of the Code which govern consolidation and other advances of supervised loans, respectively.

Okla.Stat.tit. 14A §3-508A. Loan finance charge for supervised loans

(1) With respect to a supervised loan, including a loan pursuant to a revolving loan account, a supervised lender may contract for and receive a loan finance charge not exceeding that permitted by this section.

(2) The loan finance charge, calculated according to the actuarial method, may not exceed the equivalent of the greater of either of the following:

(a) the total of

(i) thirty percent (30%) per year on that part of the unpaid balances of the principal which is Three Hundred Dollars ($300.00) or less;

(ii) twenty-one percent (21%) per year on that part of the unpaid balances which is more than Three Hundred Dollars ($300.00) but does not

exceed One Thousand Dollars ($1,000.00); and

(iii) fifteen percent (15%) per year on that part of the unpaid balances of the principal which is more than One Thousand Dollar ($1,000.00); or

(b) twenty-one percent (21%) per year on the unpaid balances of the principal.

(3) This section does not limit or restrict the manner of contracting for the loan finance charge, whether by way of add-on, discount, or otherwise, so long as the rate of the loan finance charge does not exceed that permitted by this section. If the loan is precomputed:

(a) the loan finance charge may be calculated on the assumption that all scheduled payments will be made when due; and

(b) the effect of prepayment is governed by the provisions of rebate upon prepayment (Section 3-210).

(4) The term of a loan, for the purpose of this section, commences on the date the loan is made. Differences in the lengths of months are disregarded and a day maybe counted as one-thirtieth (1/30) of a month. Subject to classifications and differentiations of the lender may establish, a part of a month in excess of fifteen (15) days may be treated as a full month if periods of fifteen days or less are disregarded and if that procedure is not consistently used to obtain a greater yield than would otherwise be permitted.

(5) Subject to classifications and differentiations the lender may reasonably establish, he may make the same loan finance charge on all principal amounts within a

specified range. A loan finance charge so made does not violate subsection (2) if

(a) when applied to the median amount within each range does not exceed the maximum permitted in subsection (2) and

(b) when applied to the lowest amount within each range, it does not produce a rate of loan finance charge exceeding the rate calculated according to paragraph (a) by more than eight percent (8%) of the rate calculated according to paragraph (a).

Laws 1969, c. 352, §3-508A, eff. July 1, 1969; Laws 1981, c. 177 §3.

Okla.Stat.tit. 14A §3-508B. Loan finance charge for loans with principal of One Hundred Dollars or less

(1) On loans having a principal of One Hundred Dollars ($100.00) or less, a supervised lender may charge in lieu of the loan finance charges specified in Section 3-508A, the following amounts:

(a) on any amount up to and including Twenty-nine Dollars and ninety-nine cents ($29.99), a charge may be added at the ratio of One Dollar ($1.00) for each Five Dollars ($5.00) of principal;

(b) on any loan in an amount in excess of Twenty-nine Dollars and ninety-nine cents ($29.99) up to and including the amount of Thirty-five Dollars ($35.00), there shall

be allowed an acquisition charge for making the loan not in excess of 1/10 of the amount of the principal. In addition thereto, an installment account handling charge shall be allowed not exceed Three Dollars ($3.00) per month;

(c) on any loan of an amount in excess of Thirty-five Dollars ($35.00) but not more than Seventy Dollars ($70.00), there shall be allowed an acquisition charge for making the loan not in excess of 1/10 of the amount of the principal. In addition thereto, an installment account handling charge shall be allowed not to exceed Three Dollars and fifty cents ($3.50) per month;

(d) on any loan of an amount in excess of Seventy Dollars ($70.00) but not in excess of One Hundred Dollars ($100.00), there shall be allowed an acquisition charge for making the loan, not in excess of 1/10 of the amount of the principal. In addition thereto, an installment account handling charge shall be allowed not to exceed Four Dollars ($4.00) per month.

(e) on any loan in an amount in excess of One Hundred Dollars ($100.00) up to and including the amount of One Hundred Fifty Dollars ($150.00), there shall be allowed an acquisition charge for making the loan not in excess of 1/10 of the amount of the principal. In addition

thereto, an installment account handling charge shall be allowed not to exceed Four Dollars and fifty cents ($4.50) per month;

(f) on any loan of an amount in excess of One Hundred Fifty Dollars ($150.00) but not more than Two Hundred Dollars ($200.00), there shall be allowed an acquisition charge for making the loan not in excess of 1/10 of the amount of the principal. In addition thereto, an installment account handling charge shall be allowed not to exceed Five Dollars per month;

(2) The maximum term of any loan made under the terms of this section shall be one (1) month for each Ten Dollars ($10.00) of principal up to a maximum term of ten (10) months. Provided, however, that under subsections (e) and (f) the maximum terms shall be one (1) month for each Twenty Dollars ($20.00) of principal up to a maximum term of ten (10) months.

(3) The minimum term of any loan made under the terms of subsections (b) through (f) of this section shall be no less than sixty (60) days. Any loan made under the terms of this section shall be scheduled to be payable in substantially equal installments at not less than thirty (30) day intervals, with the first installment to be scheduled to be due not less than one (1) calendar month after the date such loan is made.

(4) Loans made under this section may be refinanced or consolidated according tot he provisions of

this section, notwithstanding anything in this act[47] to the contrary. When a loan made under this section is refinanced or consolidated, installment account handling charges on the loans being refinanced or consolidated must be rebated pursuant to the provisions regarding rebate on prepayment (Section 3-210) as of the date of refinancing or consolidation. For the purpose of determining the amount of acquisition and installment account handling charges permitted in relation to the refinancing or the consolidation of loans made under this section, the principal resulting from the refinancing or consolidation is the total of the unpaid balances of the principal of the loans being refinanced or consolidated, plus any new money advanced, and any delinquency or deferral charges if due and unpaid, less any unearned acquisition and installment account handling charges imposed in connection with loans being refinanced or consolidated.

(5) On such loans under this section, no insurance charges or any other charges of any nature whatsoever shall be permitted.

(6) Except as otherwise provided, the acquisition charge authorized herein shall be deemed to be earned at the time a loan is made and shall not be subject to refund. Provided, however, in a loan made under this section which is prepaid in full, refinanced or consolidated within the first sixty (60) days, the acquisition charge under this section will not be fully earned at the time the loan is made, but must be refunded pro rata at the rate of one

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[47]Title 14A, §2-101 et seq.

sixtieth (1/60) of the acquisition charge for each date from the date of the prepayment, refinancing or consolidation to the sixtieth day of the loan. On the prepayment of any loan under this section, the installment account handling charge shall be subject to the provisions of Section 3-210 as it relates to refunds. Provisions of Section 3-203 as it relates to delinquency charges and Section 3-204 as it relates to deferral charges shall apply to loans made under the section.

Amended by Laws 1997, c. 288, §7.

(2)

No. 99-1335

Supreme Court, U.S.
FILED
MAR 1 - 2000
CLERK

In The

Supreme Court of the United States

SECURITY FINANCE CORP., WORLD ACCEPTANCE CORPORATION, BELL FINANCE COMPANY OF ARDMORE, INC., TLB SUN LOAN COMPANY NUMBER 1, INC., HENNESSEE, INC., AND QUAD STATES SERVICES, INC.,

Petitioners,

versus

EARL CLARK, ACTING ADMINISTRATOR, OKLAHOMA DEPARTMENT OF CONSUMER CREDIT, and the OKLAHOMA DEPARTMENT OF CONSUMER CREDIT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION

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March 1, 2000

2200

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Supreme Court of Oklahoma to apply its Order retroactively results in the taking of property without due process of law.

PARTIES

The parties to this appeal before the Supreme Court of Oklahoma were the Independent Finance Institute, Your Credit, Inc., Noble Finance Corporation, Advance Loan, Inc., Express Loan, Inc., Cash Loan, Inc., Central Loan, Inc., Modern Loan, Inc., Signature Loan, Inc., Tide Finance, Inc., United Finance Co., Inc. of Oklahoma City, First Capital Finance Co., Ardmore Finance Corp., Surety Finance Service, Inc., Master Finance Corp., Gill Finance Corp., Don's Inc., d/b/a Commerce Finance of McAlester, World Acceptance Corporation, Security Finance Corp., Quad States Services, Inc., Bell Finance Company of Ardmore, Inc., Hennessee, Inc., TLB Sun Loan Company Number 1, Inc., Western Shamrock Corp., Budget Finance Co., Rayco Loan Services, Inc., Money Services, Inc., Kent Finance Co., Cash Credit, Inc., d/b/a Public Finance Com., Emily Corp., and Oklahoma Small Loan Association, plaintiffs in the District Court, appellees in the Supreme Court of Oklahoma and petitioners herein and Earl Clark, Acting Administrator of the Oklahoma Department of Consumer Credit and the Oklahoma Department of Consumer Credit, defendants in the District Court and the appellants in the Supreme Court of Oklahoma.

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OPINIONS BELOW

The May 11, 1999 Order of the Supreme Court of Oklahoma, as amended on limited rehearing by the November 4, 1999 Order, were released for official publication and appear at *Independent Finance Institute v. Clark*, 990 P.2d 845 (Okla. 1999). These Orders are set forth in the Petitioners' Appendix.

GROUNDS FOR JURISDICTION IN THIS COURT

This Petition for a Writ of Certiorari seeks review of the Order and Order on Rehearing of the Supreme Court of Oklahoma, Case No. 89,504, filed and entered by that Court on May 11, 1999, and November 4, 1999, respectively. Petitioners state that jurisdiction in this Court is conferred under 28 U.S.C. § 1257 (1993); however, the validity of a statute was never drawn in question. In the District Court, Petitioners sought a declaratory judgment and permanent injunction enjoining Respondents from implementing, enforcing or otherwise acting upon Attorney General Opinion No. 96-84. The Order of the Supreme Court of Oklahoma at footnote 19 recognized that the constitutionality of 14A O.S. §3-508B has been raised in another case, but that question was not asserted nor was the issue raised in this appeal. The due process questions raised have been that the enforcement of the Attorney General Opinion and a retroactive application of the Order of the Supreme Court of Oklahoma would violate constitutional rights, not that any of the statutes involved were unconstitutional.

STATUTES AND RULES INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oklahoma Constitution, Art. 2, §7. Due process of law.

No person shall be deprived of life, liberty, or property, without due process of law.

Relevant portions of OKLA. STAT. tit. 14A, §§ 3-205 and 3-508A (1991) and § 3-508B (Supp. 1999), the Uniform Consumer Credit Code, are set forth in the Petitioners' Appendix. Relevant portions of OKLA. STAT. tit 14A, §3-508B (1991) and § 3-205 (Supp. 1999), the Uniform Consumer Credit Code, are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Following discussions with veteran staff and industry, the Administrator of the Oklahoma Department of

Consumer Credit[1] requested a formal opinion from the Oklahoma Attorney General about the statutory interpretation of refinancing of consumer loans under 14A O.S. 1991, § 3-508B.

On February 20, 1997, the Oklahoma Attorney General issued Opinion No. 96-84 ("Opinion") in which he opined:

> When refinancing a small consumer loan - less than $640 - supervised lenders, under the provisions of 14A O.S. 1991, § 3-508B, may not impose an acquisition charge or an installment account handling charge in lieu of the finance charge permitted under 14A O.S. 1991, § 3-508A.

The Oklahoma Department of Consumer Credit ("Department") announced the Opinion to the industry on February 21, and on February 26, notified the industry that the Opinion would be enforced effective March 3. On February 27, Petitioners filed a Petition for declaratory judgment and permanent injunction seeking to enjoin Respondents from implementing, enforcing or otherwise acting upon the Opinion.

The District Court of Oklahoma County issued the permanent injunction against Respondents finding that the footnote was not a part of the statutes and was not part of Oklahoma law, and the Department had allowed loans made under 14A O.S. 1991, § 3-508B to be refinanced under 14A O.S. 1991, § 3-508B for twenty-seven years. Respondents

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[1] On March 26, 1997, the Commission on Consumer Credit terminated this Administrator following an executive session in which discussions are confidential.

appealed the decision, and the appeal was heard by the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma issued its Order on May 11, 1999, reversing the District Court's decision and dissolving the permanent injunction. The holding stated:

> Because of the strictures of 14A O.S. 1991, § 3-205, lenders who refinance supervised loans, whether initially made under either § 3-508A or § 3-508B, are limited to assessing loan finance charges permitted by 14A O.S. 1991 § 3-508A.

Petitioners filed a Petition for rehearing and for clarification, and a limited rehearing was heard by the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma issued its Rehearing Order on November 4, 1999. The Rehearing Order limited the Court's pronouncement to "section 3-508B loans refinanced between March 3, 1997, and August 29, 1997," and the Court found:

> [N]o hardship or inequity in applying this decision to refinancing agreements entered into after the Administrator gave notice on March 3, 1997. After the letter of enforcement was sent, lenders were on notice that the lesser charges of subsection 3-508A might apply to refinancing of subsection 3-508B loans.

REASONS FOR DENYING THE WRIT

A Writ of Certiorari should not be granted in this case for several reasons.

First, grounds for jurisdiction in this Court cannot be conferred under 28 U.S.C. § 1257(1993), because the validity of a statute was never drawn in question. As stated on page 1, the actions sought in District Court were a declaratory judgment and permanent injunction enjoining Respondents from implementing, enforcing or otherwise acting upon Attorney General Opinion No. 96-84. The Order of the Supreme Court of Oklahoma at footnote 19 recognized that the constitutionality of 14A O.S. § 3-508B has been raised in another case, but that question was not asserted nor was the issue raised in this appeal. The due process questions raised have been that the enforcement of the Attorney General Opinion and a retroactive application of the Order of the Supreme Court of Oklahoma would violate constitutional rights, not that any of the statutes involved were unconstitutional. However, if this Court grants a Writ of Certiorari, the Petitioners' second question should not be considered since the constitutionality of 14A O.S. § 3-508B was not asserted nor raised in this case.

Second, there are no conflicts between this Court's decisions or federal court decisions from other jurisdictions and the Order issued by the Supreme Court of Oklahoma. Petitioners quote *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), *U.S. v. Morehead*, 959 F.2d 1489, 1512 (10th Cir. 1992), and *In re Daniel, Deborah and Leslie H.*, 591 P.2d 1175, 1177 (Okla. 1979) for their proposition that the retroactive application of the Order would impose a duty with which Petitioners had no prior notice or opportunity to comply. Petitioners cannot contend that they did not have

fair warning to know what was prohibited. The Opinion was requested on August 1, 1996, was issued on February 20, 1997, was announced to the industry on February 21, and on February 26, the industry was notified that the Opinion would be enforced effective March 3. Since there was a dispute about the statutory interpretation, Petitioners cannot claim that the affirmation of the Attorney General Opinion was unforeseeable and unexpected before they continued to refinance B loans under the provisions of 14A O.S. 1991, § 3-508B. In its Rehearing Order, the Supreme Court of Oklahoma found:

> [N]o hardship or inequity in applying this decision to refinancing agreements entered into after the Administrator gave notice on March 3, 1997. After the letter of enforcement was sent, lenders were on notice that the lesser charges of subsection 3-508A might apply to refinancing of subsection 3-508B loans.

Third, there is no public policy issue with regard to the B lenders. 14A O.S. § 3-508B is unique to Oklahoma, and the state court of last resort in Oklahoma interpreted its law and found no violation of constitutional rights since the B lenders had notice. The public policy issue in this case is with the tens of thousands of consumers that were overcharged by B lenders that continued to refinance B loans under 14A O.S. 1991, § 3-508B, as they are entitled to refunds and deserve no less.

In reviewing the state statutes in question, the Supreme Court of Oklahoma applied common rules of construction. Although Petitioners place much emphasis on the length of time that B lenders were allowed to refinance

B loans under 14A O.S. 1991, § 3-508B, the Court found that the Department's construction was unreasonable and clearly wrong. Thus, the deference rule was inappropriate. In determining legislative intent, first, the Court found that the 1997 legislative amendments did not change the statute, but clarified it and supported the Attorney General Opinion. The amendments codified a compromise between what B lenders had been charging and what they should have been charging when B loans were refinanced. If B lenders had charged what they should have been charging, then they would have earned less when B loans were refinanced than when the loans were originally made. Under the amendments, B lenders do earn less when refinancing B loans than when the loans are originally made, although not as much less as under the provisions in 14A O.S. 1991, § 3-508A. The amendments did not change this underlying precept, but moved the refinancing provisions from 14A O.S. 1991, § 3-508A to 14A O.S. Supp. 1999, § 3-508B. The Court's conclusion that B loans could not be refinanced under 14A O.S. 1991, §3-508 B concerned which charges were correct, not the section number. Second, the Court indicated that once the Legislature became aware of the statutory inconsistency, it enacted amendments. Thus, the Legislature could not have acquiesced in the Department's interpretation, because it did not have notice of it. Third, the Court found that the footnote did not change the substantive meaning of the statute as originally intended by the Legislature so it became a part of the statute.

Oklahoma has adopted the federal retroactivity analysis that requires retroactive application of a new civil-law (non-criminal) rule that was applied to the parties in the case in which it was announced. *Strelecki v. Oklahoma Tax Comm'n,* 872 P.2d 910, 915 (Okla. 1993) citing *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86 (1993) and *James*

B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991). Since this case involves a new principle of law, no due process rights are violated by the pronouncement's retroactive effect.

Applying the Order retroactively would not constitute an unreasonable confiscation of Petitioners' businesses and property in violation of the Fourteenth Amendment to the *United States Constitution* and Article 2, Section 7 of the *Oklahoma Constitution*. Reducing the refinancing rate on B loans from the provisions in 14A O.S. 1991, § 3-508B to 14A O.S. 1991, § 3-508A does not necessarily mean no reasonable return since B lenders would be allowed to charge the maximum amount under 14A O.S. 1991, § 3-508A, which is 30% APR. Petitioners' inability to conduct business as they had heretofore done does not make the rate confiscatory. With the 1997 legislative amendments, B lenders had to make some business changes, and absent those legislative amendments, B lenders would have made similar changes with the enforcement of the Attorney General Opinion.

CONCLUSION

For the above reasons, Respondents request that this Court deny a Writ of Certiorari to the Supreme Court of Oklahoma.

Respectfully submitted,

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March 1, 2000

APPENDIX A

RELEVANT PORTIONS OF THE OKLAHOMA UNIFORM CONSUMER CREDIT CODE

OKLA. STAT. tit. 14A, § 3-508B (1991). Loan finance charge for loans with cash advance of One Hundred Dollars or less

(1) On loans having a cash advance of One Hundred Dollars ($100.00) or less, a supervised lender may charge in lieu of the loan finance charges specified in Section 3-508A, the following amounts:

(a) on any amount up to and including Twenty-nine Dollars and ninety-nine cents ($29.99), a charge may be added at the ratio of One Dollar ($1.00) for each Five Dollars ($5.00) cash advanced to the borrower;

(b) on any cash advance in an amount in excess of Twenty-nine Dollars and ninety-nine cents ($29.99) up to and including the amount of Thirty-five Dollars ($35.00), there shall be allowed an acquisition charge for making the advance not in excess of 1/10 of the amount of the cash advanced. In addition thereto, an installment account handling charge shall be allowed not to exceed Three Dollars ($3.00) per month;

(c) on any cash advance of an amount in excess of Thirty-five Dollars ($35.00) but not more than Seventy Dollars ($70.00), there shall be allowed an acquisition charge for making the advance not in excess of 1/10 of the amount of the cash advanced. In addition thereto, an installment account handling charge shall be

allowed not to exceed Three Dollars and fifty cents ($3.50) per month;

(d) on any cash advance of an amount in excess of Seventy Dollars ($70.00) but not in excess of One Hundred Dollars ($100.00), there shall be allowed an acquisition charge for making the advance, not in excess of 1/10 of the amount of the cash advanced. In addition thereto, an installment account handling charge shall be allowed not to exceed Four Dollars ($4.00) per month.

(e) on any cash advance in an amount in excess of One Hundred Dollars ($100.00) up to and including the amount of One Hundred Fifty Dollars ($150.00), there shall be allowed an acquisition charge for making the advance not in excess of 1/10 of the amount of the cash advance. In addition thereto, an installment account handling charge shall be allowed not to exceed Four Dollars and fifty cents ($4.50) per month;

(f) on any cash advance of an amount in excess of One Hundred Fifty Dollars ($150.00) but not more than Two Hundred Dollars ($200.00), there shall be allowed an acquisition charge for making the advance not in excess of 1/10 of the amount of the cash advance. In addition thereto, an installment account handling charge shall be allowed not to exceed Five Dollars ($5.00) per month;

(2) The maximum term of any loan made under the terms of this section shall be one (1) month for each Ten Dollars ($10.00) of cash advance up to a maximum term of ten

> (10) months. Provided, however, that under subsections (e) and (f) the maximum terms shall be one (1) month for each Twenty Dollars ($20.00) of cash advance up to a maximum term of ten (10) months.

(3) On such loans under this section, no insurance charges or other charges of any nature whatsoever shall be permitted.

(4) The acquisition charge authorized herein shall be deemed to be earned at the time a loan is made and shall not be subject to refund. On the prepayment of any loan under this section, the installment account handling charge shall be subject to the provisions of Section 3-210 as it relates to refunds. Provisions of Section 3-203 as it relates to delinquency charges and Section 3-204 as it relates to deferral charges shall apply to loans made under the section.

OKLA. STAT. tit. 14A, § 3-205 (Supp. 1999).

Title 14A O.S. Supp. 1999, § 3-205 provides in pertinent part:

"With respect to a consumer loan, refinancing, or consolidation, other than one made under Section 3-508B of this title, the lender may by agreement with the debtor refinance the unpaid balance and may contract for and receive a loan finance charge based on the principal resulting from the refinancing at a rate not exceeding that permitted by the provisions on loan finance charge for consumer loans (Section 3-201) or the provisions on loan finance charge for supervised loans (Section 3-508A), whichever is appropriate.

. . ."